

**ATTACHMENT 1 TO
APCC EX PARTE LETTER OF
APRIL 15, 2002 RE EARLY PERIOD
(1992-1996) COMPENSATION:**

**APCC EX PARTE LETTER OF
DECEMBER 13, 2001 RE THE RATIO
OF SUBSCRIBER 800 CALLING TO
ACCESS CODE CALLING**

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December 13, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**NOTICE OF ORAL EX PARTE
COMMUNICATION**

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128; Colorado Payphone Association Petition for Reconsideration re Retroactive Adjustment of Second Report and Order Period Compensation; Retroactive Adjustment of Interim Compensation

Dear Ms. Salas:

On December 13, 2001, Albert H. Kramer and Robert F. Aldrich of this law firm, on behalf of the American Public Communications Council ("APCC"), had a meeting with Jon Stover and Craig Stroup of the Common Carrier Bureau's Competitive Pricing Division, and Calvin Howell of the Consumer Information Bureau. We discussed APCC's views of record on the matters pending in the above-referenced dockets.

In particular, we discussed APCC's position that the Commission's determination whether retroactive compensation adjustments with respect to independent payphone service providers ("PSPs") are warranted for the Interim Period (November 1996 – October 1997) and the Intermediate Period (October 1997 – April 1999) must take account equitable factors such as whether adjustments based on the current \$.238 rate would bring independent PSPs closer or farther from recovery of the costs on which the \$.238 rate is based. We reviewed the information previously submitted by APCC to show that such a retroactive adjustment would exacerbate the existing shortfall in independent PSPs' actual recovery for the 1998 period of the costs underlying the \$.238 rate.

As discussed in the Colorado Payphone Association's pending petition for reconsideration of the Third Report and Order in this proceeding, we urged the Commission to take into account that, due to the FCC's erroneous determination that it

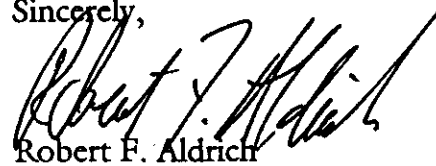
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lacked statutory authority to prescribe compensation for subscriber 800 calls, interexchange carriers ("IXCs") did not pay independent PSPs any compensation for subscriber 800 calls for a period of more than four years (May 1992 – November 1996) immediately prior to the compensation periods under review. We submitted the enclosed documents which show that during this period the average number of subscriber 800 calls ranged from 72 to more than 100 calls per payphone per month, and the ratio of subscriber 800 calls to access code calls from payphones ranged from 2:1 to 3:1. These data provide the basis for the Commission to calculate a rough estimate of the number of uncompensated subscriber 800 calls and the amount of compensation payments avoided by interexchange carriers and uncollected by PSPs during the 1992-96 period.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert F. Aldrich", written over a horizontal line.

Robert F. Aldrich

Enclosures

cc: Jon Stover
Craig Stroup
Calvin Howell

ACCESS CODE CALLS AND SUBSCRIBER 800 CALLS RECORDED BY APCC MEMBERS IN 1993, 1996 AND 1997

1993 SURVEY (1 PROVIDER)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	avg
Number of payphones						506	577	619	668	725	834	911	691
Access Code						19,283	24,108	29,819	28,427	24,179	24,084	22,294	
Subscriber 800						37,271	46,639	55,012	55,367	48,470	49,878	45,534	
Total dial around						56,554	70,747	84,831	83,794	72,649	73,962	67,828	

Per-Phone Results:

All access / ph						38.1	41.8	48.2	42.6	33.4	28.9	24.5	36.8
Subscriber / ph						73.7	80.8	88.9	82.9	66.9	59.8	50.0	71.8
Total da / phone						111.8	122.6	137.0	125.4	100.2	88.7	74.5	108.6
% ACCESS						34%	34%	35%	34%	33%	33%	33%	34%
% SUBSCRIBER						66%	66%	65%	66%	67%	67%	67%	66%

1996 Survey (23 Providers)

Per-Phone Results:

Number of Payphones	2,383	2,347	3,367	4,000	4,439	3,439	2,610	1,983	1,502	1,390	1,615	2,643
1996 subscriber	75	98	96	102	107	111	122	103	130	126	119	108
1996 total da	109	141	137	149	150	164	178	148	175	169	155	152
% ACCESS	31%	30%	30%	32%	29%	32%	31%	30%	26%	25%	23%	29%
% SUBSCRIBER	69%	70%	70%	68%	71%	68%	69%	70%	74%	75%	77%	71%

1997 Survey (21 Providers)

Per-Phone Results:

Number of Payphones	544	511	571	582	646	643	650	652	612	623	509	507	588
1997 subscriber	105	95	108	117	127	133	138	136	137	142	112	116	122
1997 total da	138	126	143	153	168	176	181	180	176	180	142	146	159
% ACCESS	24%	25%	25%	24%	24%	24%	24%	24%	22%	21%	21%	21%	23%
% SUBSCRIBER	76%	75%	75%	76%	76%	76%	76%	76%	78%	79%	79%	79%	77%

Sources:

APCC Ex Parte Filing in CC Dkt. No. 91-35, dated August 17, 1995

APCC Ex Parte Filing in CC Dkt. No. 96-128, dated September 28, 1998

RETROACTIVE COMPENSATION ADJUSTMENTS

Ex Parte Presentation

CC Docket No. 96-128

American Public Communications Council

I. THE AMOUNT OF ANY INTERIM PERIOD COMPENSATION ADJUSTMENTS CANNOT BE DECIDED IN ISOLATION

- ◆ The Commission has linked retroactive compensation adjustments for the Interim Period (November 1996 – October 1997) and the Second Report and Order Period (October 1997 – April 1999).
- ◆ For both periods, retroactive post-remand compensation adjustments are not automatic: they are to be ordered only if the equities so require. *Towns of Concord v. FERC*, 955 F.2d 67, 75-76 (D.C. Cir. 1991).
- ◆ The Commission has made no final ruling to date on retroactive adjustments for the Interim Period *or* the Second Report and Order Period.
 - As to the Interim Period, the FCC has reached only “tentative” conclusions to date.
 - As to the Second Report and Order period, the FCC has yet to decide the Colorado Payphone Association’s Petition for Partial Reconsideration of the *Third Report and Order*, filed April 21, 1999, which requests the Commission to reconsider its decision to require retroactive adjustments for independent PSPs for the Second Report and Order Period.

II. THE EQUITIES DO NOT SUPPORT RETROACTIVE APPLICATION OF THE \$.24 (\$.238) RATE TO INDEPENDENT PSPS

- A. Independent PSPs’ actual compensated call volumes in the Second Report and Order Period averaged far below the level estimated by the Commission as the basis for calculating the \$.238 rate**
- ◆ The current compensation rate (\$.238 per call), which would be retroactively applied, is based on the Commission’s finding that a *marginal* payphone has 439 calls per month, of which 142 are compensable dial-around calls. The \$.238 rate was set to recover relevant portions of the fixed cost of a marginal payphone.

- ♦ The Commission found that call volume is higher at *average* payphones than at *marginal* payphones. APCC's survey of actual 1997 (Interim Period) call volumes showed that the *average* independent payphone had 159 compensable dial-around calls per month.
 - ♦ Actual compensation payments to independent PSPs in 1998 were made on an *average* of about 109 calls per payphone per month, 68.6% of the 159 compensable calls at an average independent payphone.
 - ♦ Reasonably applying the paid-call percentage for *average* independent payphones (68.6%) to *marginal* payphones' call volume of 142 calls per month yields a 1998 paid call volume for marginal payphones of about 97 calls per payphone per month, 45 calls below the level necessary to fully recover marginal payphone costs.
- B. Even at the \$.284 rate, independent PSPs were undercompensated in 1998
- ♦ The *Third Report and Order* intended that marginal payphones would recover \$33.80/phone/month dial-around compensation ($$.238/\text{call} \times 142 \text{ calls} = \33.80).
 - ♦ As shown above, marginal payphones were actually compensated for only 97 calls per month in 1998, for total compensation of \$27.55 per payphone per month (at the 1998 rate of \$.284) -- \$6.25 short of the \$33.80 contemplated by the *Third Report and Order*.
- C. Retroactively applying the \$.238 rate would exacerbate the undercompensation of independent PSPs
- ♦ If the Commission applies the current \$.238 rate retroactively to 1998 call counts, as proposed, marginal payphones' compensation would be reduced to \$23.09 per payphone per month -- \$10.71 short of the \$33.80 contemplated by the *Third Report and Order*.
 - ♦ To ensure the amount of cost recovery intended by the *Third Report and Order*, adjusted compensation for the Interim Period and Second Report and Order Period, if based on actual 1998 paid call volumes, would have to be set at \$.348 per call ($\$33.80/97 = \$.348$).

- ◆ Retroactive compensation adjustments are not warranted, with respect to independent payphones, for the Interim Period *or* the Second Report and Order Period.

III. THE RBOCs' INTERIM PERIOD COMPENSATION PROPOSAL IS UNWORKABLE AND UNFAIR TO INDEPENDENT PSPS

- ◆ The RBOCs recommend using actual 1998 per-call compensation payments (recalculated at the \$.24 – actually \$.238 for retroactivity purposes -- rate) as the basis for adjusting PSPs' Interim Period compensation.
- ◆ Most IXC*s as well as* independent PSPs oppose the RBOC proposal.
- ◆ 1998 compensation payments are wholly unreliable as indicators of independents' dial-around call volumes, due to the massive problems with FLEX ANI compensation and resellers.
- ◆ Translating payments from one period to another would generate huge administrative problems.

IV. THE COMMISSION COULD REASONABLY REACH A DIFFERENT RESULT WITH RESPECT TO ILEC PAYPHONES, WHICH APPEAR TO BE DIFFERENTLY SITUATED

- ◆ ILECs were not eligible for, and did not collect, compensation payments during the first five months of 1996.
- ◆ Most ILECs did not experience the same call tracking problems as independent PSPs in 1998, because most lines connected to ILEC payphones did not require FLEX ANI in order to transmit payphone call identifiers to IXCs.
- ◆ Retroactive application of the \$.238 rate would bring the prior-period compensation of ILECs – but not independent PSPs – closer to cost recovery levels.

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FILE NUMBER 45691-463(B)
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August 17, 1995

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FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street; N.W.
Room 222
Washington, D.C. 20554

EX PARTE PRESENTATION

Re: Operator Service Access and Pay Telephone
Compensation/CC Dkt. No. 91-35

Dear Mr. Caton:

The American Public Communications Council ("APCC"), a national trade association of providers of independent public payphones ("IPPs")^{1/} and public communications services, urges the Commission to comply immediately with the remand ordered by the U.S. Court of Appeals for the D.C. Circuit in Florida Public Telecommunications Association, Inc. v. FCC, 54 F.3d 857 (D.C. Cir. 1995) ("FPTA"), remanding Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991) ("First Report and Order"). The FPTA remand order requires the Commission to consider the need for prescribing compensation for IPP providers for the use of their equipment in originating "subscriber" 800 calls. IPP providers have been waiting over four years for the Commission to take up this issue. They have been subjected to years of unnecessary procedural wrangling and delay. They should be not forced to wait any longer. The Commission should immediately begin a proceeding to address this issue in the manner described below.

^{1/}IPPs are payphones that are not owned by a local exchange carrier ("LEC"). The Commission has referred to IPP providers in past proceedings as "competitive payphone owners" ("PPOs") or "private payphone owners." Other phrases and associated acronyms that have been used to refer to IPP providers include "customer-owned coin-operated telephone" ("COCOT") providers, and "customer-owned pay telephone" ("COPT") providers.

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APCC also urges the Commission to amend its rules to require all interexchange carriers ("IXCs") with revenues above the appropriate threshold to pay dial-around compensation (including subscriber 800 call compensation, once it is prescribed), rather than limiting the obligation to just those that "provide live or automated operator services," as is currently the case. See 47 C.F.R. § 64.1301(b)(2). Although Section 226(e)(2) of the Communications Act (47 U.S.C. § 226(e)(2)) does not explicitly require the Commission to "consider the need for compensation" for calls routed to IXCs that are not "providers of operator services," the Commission is clearly authorized to do so under the Act. The Commission can, and should, propose amending its rules in this manner at the same time it considers the need to prescribe subscriber 800 compensation.

I. BACKGROUND

A. The Current Compensation Rules.

Prior to 1992, IPP providers only received revenue from coin payments for local calls and "1+" toll calls, and commissions paid by presubscribed operator services providers ("OSPs"). When a caller "dialed around" the presubscribed OSP, IPP providers received no compensation. IPP providers were uncompensated for such "dial around" calls regardless of whether the caller dialed an access code, a subscriber 800 number or any other dial-around dialing sequence.

Congress recognized the inequity of IPP providers not being compensated when "dial-around" calls were made using their equipment. Thus, in the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), Pub. L. No. 101-435, 104 Stat. 986 (codified at 47 U.S.C. § 226(e)(2)), Congress directed the Commission to:

. . . consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.

47 U.S.C. § 226(e)(2).

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TOCSIA was enacted into law on October 17, 1990. Congress set a deadline of nine months from that date, or until July 17, 1991, for the Commission to determine whether to prescribe compensation. Id.^{2/} On July 11, 1991, several days short of Congress' deadline, the Commission concluded that IPP providers should be compensated for originating access code calls to IXCs.^{3/} The Commission recognized that IPP providers were benefiting both the public and the IXCs to which access code calls were routed by providing facilities for making access code calls, yet IPP providers were not receiving any revenue for providing this useful service. First Report and Order, 6 FCC Rcd at 4745-46. The Commission said that it is "only fair" that the cost of maintaining IPP equipment used to access IXCs "be shared by the consumers who benefit from the ability to make access code calls and by the [IXCs] who derive revenue from the calls." Id.

Further comment was then requested on the mechanics of ordering compensation, despite the fact that comments on those issues had already been filed. It was not until May of 1992 -- eighteen months after TOCSIA was enacted -- that the rules for access code call compensation were finally released. See Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 FCC Rcd 3251 (1992) ("Second Report and Order").

B. The Commission's Refusal To Consider Subscriber 800 Calls.

During the proceedings leading to the First Report and Order, APCC and others told the Commission that subscriber 800 calls are within the class of calls that are compensable, since subscriber 800 calls, like access code calls, "dial around" IPP providers' presubscribed OSPs, and since IPP providers have no other effective means to earn revenue for originating such calls. However, the

^{2/}APCC argued that the statute required the Commission both to determine whether to order compensation and to set the compensation. The Commission declined to do the latter by the statutory deadline; instead it instituted a further proceeding to set the level of compensation and resolve related issues. See First Report and Order, 6 FCC Rcd at 4747.

^{3/}As discussed herein, the Commission limited responsibility for compensation to those IXCs that both (1) earn annual toll revenues in excess of \$100 million, and (2) provide live or automated operator services. 47 C.F.R. § 64.1301(b).

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Commission ruled that the scope of TOCSIA was confined to access code calling only, and declined even to consider the need to prescribe compensation for IPP providers for originating subscriber 800 calls. First Report and Order, 6 FCC Rcd at 4745-46.

On September 16, 1991, APCC filed a petition for reconsideration of the Commission's decision to exclude subscriber 800 calls from consideration. APCC explained that the plain language of TOCSIA clearly encompassed subscriber 800 calls, that the exclusion of subscriber 800 calls from the compensation scheme was inconsistent with the Commission's existing policies, and that subscriber 800 numbers were widely used at payphones, making it imperative to prescribe compensation for these calls for the same fundamental equity reasons that mandate compensation for access code calls.

Approximately ten months after APCC filed its petition for reconsideration, the Commission again refused to consider whether compensation for subscriber 800 calls is needed. The Commission reaffirmed its position that subscriber 800 calls were excluded from the statutory compensation provision, and that it therefore was not necessary to consider the need for compensation for subscriber 800 calls within the context of the TOCSIA implementation proceeding. Operator Service Access and Pay Telephone Compensation, Order on Reconsideration, 7 FCC Rcd 4355, 4367 (1992).

The Commission did not, however, rule that compensation for subscriber 800 calls was unjustified or otherwise inappropriate. Nor did the Commission rule that it lacked authority to prescribe compensation for these calls. The Commission merely stated that APCC's request for subscriber 800 compensation was outside the scope of the TOCSIA implementation proceedings since it did not fit within TOCSIA's mandate requiring the Commission to consider the need for "dial-around" compensation.

C. The FFTA Decision.

APCC and the FFTA sought Court review of the Commission's decision.^{4/} The Court in FFTA found the Commission's narrow

^{4/}Briefing and argument in the case were delayed for two and one-half years because the Commission argued to the Court that briefing should not proceed while the Commission was deliberating
(continued...)

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interpretation of TOCSIA's scope to be "completely unconvincing." FPTA, 54 F.3d at 859. "Subscriber-800 calls," the Court said, "fall undeniably -- plainly and unambiguously -- within the statutory language." Id. The Court, therefore, granted APCC's and FPTA's petitions and remanded to the Commission to consider the need to prescribe compensation for subscriber 800 calls. Id. Thus, this issue now comes back to the Commission for a decision that the Commission could have, and should have, made four years earlier.

D. The Use of Subscriber 800 Numbers at
Payphones is Growing at a Rapid Pace.

The four-year delay in considering this issue has been costly to IPP providers. The use of subscriber 800 numbers at IPP locations was already significant when the First Report and Order was adopted in 1991. Since adoption of that order, the market for subscriber 800 services has experienced explosive growth, both in terms of revenues and minutes of use. See generally, 1995 NATA Telecommunications Market Review and Forecast at 69-75 ("NATA Review and Forecast").

The implementation of 800 number portability in 1993 has proven to be a significant factor contributing to this rapid expansion. Id. Portability, which allows subscribers to switch carriers and still retain their 800 numbers, is creating vigorous competition among the IXCs. Id. Increased competition has led to enhanced features, improved service, more efficient billing, and the roll-out of new services and programs targeted to new subscribers. Id. All of these factors have led to millions of new 800 subscribers and users within the last few years.

For example, many IXCs are targeting small and medium-sized businesses with product mixes that include subscriber 800 numbers. Id. The result has been that millions of business that did not previously subscribe to their own 800 number now subscribe to 800

4/(...continued)
petitions for reconsideration of the Second Report and Order, supra, in which the Commission determined the level of compensation. After two and one-half years, the Court apparently grew tired of waiting for the Commission to resolve the unrelated issues in the reconsideration proceeding and ordered briefing and argument in FPTA beginning in October of 1994.

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numbers both as a service to their customers and as a means for their traveling employees to reach the company's home office, dispatch center, voice-mail, private branch exchange ("PBX") or similar platform. And IXC's are now aggressively pursuing the mass consumer market in addition to traditional commercial users. For example, several IXC's are offering "personalized" or "follow-me" 800 number services, which allow subscribers to consolidate all of their existing telephone numbers (i.e., home, office, car, etc.) as well as call-forwarding information into a single 800 number.^{2/} Other applications include parents with children away at school who subscribe to 800 numbers as an automated form of collect calling by their children.

In short, the market for subscriber 800 services is larger and more competitive, and it is likely to experience further growth and competition within the next few years. Thousands of new 800 numbers and services are coming on line every week, and millions of customers are now using 800 services on a regular basis.

Indeed, 800 number calling is so popular that the supply of 800 numbers may be exhausted as early as February of 1996, well before the Commission or the industry had previously anticipated.^{3/} To help alleviate the problems of a short supply, the Commission has been conducting a series of meetings with the industry to discuss ways to accelerate deployment of the new toll-free "888" area code.^{4/} Those meetings are designed to help conserve use of

^{2/}MCI, for example, issued a press release on September 7, 1994, announcing its new "Friends & Family Personal Number," which it describes as "the industry's first consumer 800 number service which allows callers to reach you toll-free from any phone. . . ."

^{3/}See "'800' Number Exhaust Still Expected before '888' Availability," Telecommunications Reports, July 3, 1995 at 11. See also "Popularity Takes Toll on 800 Numbers," The Washington Post, July 5, 1995, at A1.

^{4/}See, e.g., Letter from Kathleen Wallman, Chief, Common Carrier Bureau, to Michael Wade, President, Database Service Management, Inc., dated June 13, 1995 ("We are concerned . . . about the recent accelerated depletion of the remaining available 800 numbers.").

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existing 800 numbers and accelerate the availability of the new "888" method of toll-free dialing. Id.^{8/}

As more and more new services such as these continue to take hold, it will not be long before 800 number dialing becomes the predominant form of long distance calling. Indeed, current figures indicate that on a typical business day, 30 percent to 40 percent of all long distance calls involve 800 numbers.^{2/} And in terms of network minutes, analysts predict 50 billion minutes of use by year-end 1995, growing to just under 60 billion by year-end 1997. NATA Review and Forecast at 72.

This "toll-free" 800 number explosion has generated a huge volume of uncompensated traffic at payphones. Statistics submitted to the Commission by Sprint Corporation show that over one half of coinless interLATA calls made from payphones in Sprint's local exchange territories are subscriber 800 calls.^{10/} Data gathered

^{8/}The Industry Numbering Committee is also exploring the allocation of other new toll-free numbers, such as "300" or "400" numbering series, in anticipation of future demand. NATA Review and Forecast at 75 n.2.

^{2/}See "Hanging Up on Scams," New York Newsday, August 11, 1994, at A47; and "Dialing for Dollars: 1-800 Business Keeps Surging," The Washington Post, May 31, 1994, at C1.

^{10/}Letter from H. Richard Juhnke, General Attorney, Sprint Corporation, to William F. Caton, Acting Secretary, CC Docket No. 92-77 (filed December 23, 1994) ("Sprint ex parte Letter"). Over a 14-day period, Sprint reported that payphones (LEC payphones and IPPs) in its LEC territories generated 2,685,311 interLATA calls that were either 0+ or access code calls. Sprint reported that 55.9%, or about 1.5 million, of these calls were 0+ calls and that 44.1%, or about 1.18 million, were access code calls. In addition, Sprint reported that about 3.29 million calls were made to subscriber 800 numbers. Putting these three categories together, there were a total of about 5.97 million 0+, access code, and subscriber 800 calls. About 25% of this total were 0+, 20% of the total were access code, and about 55% of the total were subscriber 800 calls. See Attachment 1.

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from other payphone providers confirm that subscriber 800 calls represent a huge proportion of dial-around calls.^{11/}

The increased use of 800 number calling is producing enormous revenues for the IXC's. Analysts estimate the 800 market at \$9.5 billion for year-end 1994. NATA Review and Forecast at 72. By year-end 1997, that figure is projected to reach \$11.4 billion, with an average annual growth rate of around 7 percent over the next three years. Id.

Even though IXC's have gained enormous profits from the growth of the subscriber 800 market, they still refuse to provide any payment for the use of independent payphones to originate subscriber 800 calls. IPP providers receive no revenue from the IXC's for the huge volume of subscriber 800 traffic generated at their payphones. As the use of 800 numbers from public phones continues to expand, IPP providers are seeing more and more of their revenue base disappear. At the same time, IXC's are earning substantial windfalls each day that they receive subscriber 800 calls from IPP locations without paying IPP providers for the use of their equipment in originating these calls. Meanwhile, the LEC's -- who are direct competitors of IPP providers -- have been unaffected by these fundamental changes in the marketplace since their ability to obtain full cost recovery for their payphone operations continues to be assured.

II. THE COMMISSION SHOULD CONSIDER THE SUBSCRIBER 800 COMPENSATION ISSUE WITHOUT FURTHER DELAY. THE COMMISSION SHOULD ALSO PROPOSE AMENDING ITS RULES TO REQUIRE ALL IXCs TO PAY DIAL-AROUND COMPENSATION WHETHER OR NOT THEY ARE "PROVIDERS OF OPERATOR SERVICES."

There is no valid reason for the Commission to continue to delay its consideration of subscriber 800 compensation. The court has spoken and the Commission must respond. APCC urges the Commission to promptly initiate a rulemaking to include subscriber 800 calls within the compensation scheme. Some of the issues that should be addressed by the Commission are discussed below. The first of these issues concerns whether compensation obligations for

^{11/}One IPP provider surveyed approximately 500 to 1,000 payphones located in numerous different states over a period of seven months. The data from these payphones consistently showed about twice as many subscriber 800 calls as access code calls. See Attachment 2.

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subscriber 800 calls, as well as other dial-around calls, should apply to IXC's generally and not just to IXC's which are "providers of operator services."

A. All IXC's With Revenues Above The Appropriate
Threshold Should Pay Compensation For Dial-
Around Calls.

The Commission's current rules limit the class of IXC's obligated to pay compensation to those that provide live or automated operator services. 47 C.F.R. § 64.1301(b)(2). Although consideration of the payment of compensation by IXC's which are not "providers of operator services" is not expressly required by TOCSIA or the FPTA remand, the Commission should take this opportunity to remove this limitation on the entities subject to compensation obligations -- with respect to subscriber 800 calls, access calls,^{12/} and any other category of dial-around calls for which compensation may eventually be prescribed. The compensation obligation should extend to all IXC's which carry dial-around calls, regardless of whether the IXC is a "provider of operator services." 47 U.S.C. § 226(a)(9).^{13/}

^{12/}We use the term "access call" rather than "access code call" in order to encompass calls made by dialing an access number that is technically not an "access code" because the IXC associated with it is not a "provider of operator services." See 47 U.S.C. § 226(a)(1). For example, Allnet Communications Services, Inc. ("Allnet"), which contends it is not an OSP, has an access number -- 1-800-783-1444 -- which is commonly used by Allnet subscribers to reach Allnet's call processing platform in order to make calls from payphones. If Allnet is not a "provider of operator services," then Allnet's access number does not meet the statutory definition of "access code." Yet, this access number is the counterpart of the 800 "access codes" that IXC's such as AT&T, MCI and Sprint, which are "providers of operator services," offer to their subscribers.

^{13/}Of course, to the extent that it is appropriate for other reasons, the Commission may continue to exempt certain IXC's based on revenue thresholds. For example, under the current rules there is a \$100 million threshold for access code call compensation. 47 C.F.R. § 64.1301(b)(1). Once the Commission has examined the structure of the 800 subscriber market, the Commission may determine it is necessary to establish a similar or reduced
(continued...)

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The OSP limitation in the Commission's current compensation rules has no substantive importance. The only reason for the limitation is that the statute, TOCSIA, under which the Commission initiated the proceeding in which compensation was originally prescribed, was focused on regulation of "providers of operator service" rather than carriers generally, and thus did not expressly direct the Commission to consider payment of compensation by non-OSPs. See 47 U.S.C. § 226(e)(2). The limitation of compensation to OSPs, however, has created a loophole through which certain IXC's can seek to be excluded from the compensation obligation while their competitors must pay. Indeed, there is already one IXC which exceeds the \$100 million threshold but refuses to pay dial-around compensation based upon its contention that it is not an OSP subject to the rules.^{14/}

A continuing exemption of non-OSPs from the compensation obligation could ultimately undermine the compensation scheme. As the Commission is well aware, dynamic changes are taking place in the telecommunications industry. It is not inconceivable that a number of IXC's that currently provide operator services may eliminate or out-source their operator functions. Such IXC's could continue to carry large volumes of access calls and subscriber 800 calls and argue that they are exempt from the compensation obligation due to a technical reading of the rules. The Commission should eliminate the OSP restriction to ensure that the integrity of the compensation rules is upheld.

The Commission has ample authority to effectuate such a change. The original purpose of the operator services limitation was, presumably, to stay within the confines of TOCSIA's mandate. But TOCSIA does not restrict the Commission's authority to order compensation from entities that are not OSPs. While the only express mandate in TOCSIA's compensation provision concerns OSPs, nothing in TOCSIA precludes the Commission from prescribing compensation for calls routed to other entities as well. To the contrary, the Commission has ample authority to prescribe compensation from non-OSPs under the Communications Act.

^{13/}(...continued)
threshold for subscriber 800 calls.

^{14/}See Allnet's October 18, 1993 Request for Removal from List of Potential Payors of Prescribed PPO Compensation Rates Pursuant to Paragraphs 22 and 23 of the September 16, 1993 Reconsideration Decision in CC Docket No. 91-35 (filed January 26, 1994).

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First, the Commission may invoke its ancillary jurisdiction under Title I of the Act to expand the class of IXCs obligated to pay compensation. The Commission has been given "broad responsibilities" to regulate all aspects of interstate communications by wire or radio by virtue of Section 2(a) (47 U.S.C. § 152(a)). Capital Cites Cable, Inc. v. Crisp, 467 U.S. 691, 701 (1984) (quoting United States v. Southwestern Cable Co., 392 U.S. 157 (1968)). Section 4(i) of the Act also provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The only limitation to the Commission's broad authority is that a proposed regulation or activity must be "reasonably ancillary to the effective performance of the Commission's various responsibilities." Southwestern Cable, 392 U.S. at 172-73. On the basis of this authority, the Commission frequently adopts rules that extend beyond the express provisions of the statute.

For example, in its implementation of the Telephone Disclosure and Dispute Resolution Act (TDDRA), the Commission relied upon its ancillary jurisdiction to extend the pay-per-call billing regulations mandated by the TDDRA to information services falling outside the statutory definition of "pay-per-call." See 47 C.F.R. § 64.1510(b); TDDRA Implementation, Order on Reconsideration and Further Notice of Proposed Rulemaking, 75 RR 2d 1247, 1249 (1994). Certain parties contended that the Commission lacked authority to extend the billing regulations to a class of calls outside the scope of the TDDRA. But the Commission disagreed. "Section 64.1510(b) [the expanded rule] is not inconsistent or incompatible with the statute," the Commission stated, "nor does the TDDRA restrict this Commission's ancillary jurisdiction under Title I of the Communications Act to impose additional regulations. . . ." Id.

Similarly, the Commission can invoke its ancillary jurisdiction to extend the compensation obligation beyond the OSPs covered by the express terms of TOCSIA to encompass non-OSPs. TOCSIA defined a new class of entities, "aggregators," which are subject to the Commission's jurisdiction, and directed the Commission to consider requiring certain kinds of carriers (i.e., providers of operator services) to pay compensation to certain kinds of aggregators (i.e., IPP providers) for the use of their payphones. As the Court of Appeals recognized, Congress' "primary purpose" in enacting the compensation provision was "to protect [IPP providers] from being fleeced" FPTA, 54 F.3d at 862. In doing so, Congress wanted to ensure that, at a minimum, the

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Commission considered the need to prescribe compensation from OSPs. But Congress clearly did not intend to limit the Commission's discretion to go beyond that class of carriers if it determined it was in the public interest to do so. Indeed, Section 226(i) of the Act affirms that TOCSIA was not intended to limit the Commission's authority granted under other sections of the Act. 47 U.S.C. § 226(i). Thus, including non-OSPs within the compensation scheme is clearly within the Commission's authority granted under TOCSIA and the Act.

The Commission also has authority to expand the class of IXCs under Title II of the Act. Under Title II, common carriers enjoy a fundamental right to be reasonably compensated when required to make facilities available for public use. As early as 1984, when payphone competition first began, the Commission recognized that IPP providers are common carriers subject to the Act. Universal Payphone Corp., 58 RR 2d 76, 80 n.12. (1985).

It is indisputable that, under Section 201 of the Act, carriers are entitled to earn reasonable compensation when they are compelled to interconnect with other common carriers. 47 U.S.C. § 201; see, e.g., Lincoln Telephone and Telegraph Co. v. FCC, 659 F.2d 1092, 1108 (D.C. Cir. 1981). As a practical matter, IPP providers are compelled to deliver subscriber 800 calls and other dial-around calls to the networks of the IXCs. This is because (a) IPP providers are expressly prohibited from blocking OSP "access codes"; (b) there is no directory which comprehensively classifies 800, 950, and 10XXX numbers between (1) OSP access codes and (2) IXC access numbers, subscriber 800 numbers, and other dial-around numbers; (c) even if such a directory existed, there is not enough available memory in a payphone to enable it to distinguish between all OSP access code numbers -- which must be unblocked -- and all other 800, 950 and 10XXX numbers; (d) the Commission has made clear that the blocking of numbers at payphones is generally disapproved, cf. Telecommunications Research and Action Center v. Central Corp., Int'l Telecharge, Inc., et al., 4 FCC Rcd 2157 (1989); and (e) the payphones of the local exchange carriers allow free access to (non-OSP) IXC access numbers and subscriber 800 numbers; IPP providers must do the same in order to compete.

In any event, under Title II, IPP providers are entitled to be compensated for the services they render. See, e.g., Bud Antle, Inc. v. United States, 593 F.2d 865 (9th Cir. 1979) (holding that under the Interstate Commerce Act -- the Act from which the Communications Act was born -- a transporting carrier is not excused from compensating a shipping carrier, regardless of whether

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the shipping carrier "voluntarily" provides its services). Thus, the Commission has the authority under Title II to require compensation from all IXC's who receive subscriber 800 calls and access calls from IPP locations, not just those that provide operator services.

B. Additional Issues Concerning Subscriber 800 Compensation That Should Be Addressed.

1. Per-Call Compensation.

Compensation for subscriber 800 calls can and should be ordered on a per-call basis. Since IXC's can track access code 800 calls, they should also be able to track subscriber 800 calls. Indeed, IXC's receive and capture the Automatic Number Identifications ("ANIs") associated with subscriber 800 calls; in fact, they provide those ANIs to the subscriber. See, e.g., Calling Number Identification Service, 6 FCC Rcd 6752, 6753 (1992) ("ANI is also available through IXC's in conjunction with 800 [service]").

In addition, the LECs now have the ability to track subscriber 800 calls on a per-call basis.^{15/} Thus, to the extent that any particular IXC lacks the technical ability to track subscriber 800 calls on a per-call basis, that IXC could rely on the per-call data generated by the LECs in order to verify the number of calls and amount of compensation due to any IPP provider.^{16/} In short, there should be no technical barrier to prescribing compensation for subscriber 800 calls on a per-call basis.

^{15/}See, e.g., Petition of Ameritech for Waiver of Part 69 of the Commission's Rules to Restructure its Rate to Establish a Pay Telephone Use Fee Rate Element, DA 95-1028, released May 4, 1995 ("Ameritech Per-Call Payphone Access Charge Petition"); and Petition of Southwestern Bell Telephone Company for Waiver of Part 69 of the Commission's Rules to Restructure its Rates to Establish a Pay Telephone Use Fee Rate Element, DA 95-1328, released June 14, 1995 ("SWBC Per-Call Payphone Access Charge Petition").

^{16/}This should also apply to any IXC's or OSPs which may become subject to the per-call compensation requirement for access code calls, such as proposed by APCC and several state payphone associations. See n. 17, *infra*.

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Moreover, from a policy perspective, per-call compensation is the most logical and sensible form of compensation. Indeed, the Commission has repeatedly expressed its preference for a per-call compensation system. See, e.g., First Report and Order, 6 FCC Rcd at 4745-46; and Second Report and Order, 7 FCC Rcd at 3252.

AT&T and Sprint, two of the largest IXC's, are already paying per-call compensation for access code calls.^{17/} And a rulemaking petition is pending to extend the per-call requirement for access code calls to at least two other carriers.^{18/} Thus, prescribing subscriber 800 compensation on a per-call basis should be relatively easy to administer, particularly with respect to the major carriers who already are, or may soon be, compensating IPP providers for access code calls on a per-call basis.

The modified rules should also make clear that LECs must make their payphone call tracking capabilities available to IPP providers operating in their territory.^{19/} This will provide a means for IPP providers to verify the number of compensable subscriber 800 calls routed from their payphones to each IXC.

2. Payment Mechanism.

The payment system for subscriber 800 calls can build upon the payment system that the Commission ultimately adopts for per-call access code call compensation. In the Per-Call Rulemaking Petition, APCC and the state payphone associations have proposed that the Commission continue the direct billing mechanism currently used for flat-rate access code call compensation, but that the IXC will send back to the IPP provider a statement indicating the

^{17/}See Operator Service Access and Pay Telephone Compensation, Memorandum Opinion and Order, DA 94-1612 (released December 29, 1994) ("AT&T Waiver Grant"); and Memorandum Opinion and Order, 10 FCC Rcd 5490 (1995) ("Sprint Waiver Grant").

^{18/}In the Matter of Petition of the American Public Communications Council and State Payphone Associations to Initiate, on an Expedited Basis, a Rulemaking Proceeding to Amend Section 64.1301 of the Commission's Regulations to Establish Per-Call Compensation of Independent Public Payphone Providers for Access Code Calls ("Per-Call Compensation Petition"), filed July 19, 1994.

^{19/}See Comments of APCC filed June 5, 1995, in response to Ameritech's Per-Call Payphone Access Charge Petition, supra.

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number of access code calls made from each IPP phone line. Likewise, for subscriber 800 compensation, the IXC's could send IPP providers a statement indicating the number of subscriber 800 calls made for each IPP phone line. Furthermore, in light of the LEC's ability to track dial-around calling on a per-call basis,^{20/} or other technological developments, other tracking and payment mechanisms may need to be explored.

3. Size Of Entities Required To Pay Compensation.

The Commission may exempt certain IXC's from the compensation obligation if their annual toll revenues are below a *de minimis* threshold. The \$100 million threshold that currently determines which IXC's are required to pay access code call compensation may not be the appropriate cut-off for the IXC's that should pay subscriber 800 compensation since the structure of the subscriber 800 market may be different from the structure of the access code market. Thus, the Commission should seek comment on whether a revenue threshold should be established and, if so, at what level.

4. Scope Of Compensable Calls.

Any definition of subscriber 800 calls subject to compensation should be flexible enough to include the new "888" toll-free numbers which are scheduled to be activated as early as next April.^{21/} The Commission should ensure that its definition of compensable calls is flexible enough to encompass all current and future forms of dial-around calling.

5. Amount of Compensation.

The Commission should seek comment on the appropriate amount of compensation for subscriber 800 calls.

^{20/}See, e.g., Ameritech Per-Call Payphone Access Charge Petition, supra.

^{21/}In addition, other dialing sequences may in the future generate substantial dial-around traffic from IPPs that produces revenue for the IXC. In that event, the same considerations that require prescription of compensation for subscriber 800 calls would also require prescription of compensation for such future forms of dial-around traffic.

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6. Set Use Fee vs. Carrier Fee.

The Commission should seek comment on whether to prescribe compensation for subscriber 800 calls in the form of a "set use fee," such as has been adopted in California for intraLATA calls. Under the set use fee model, the compensation obligation falls upon the end-user of the service -- in this case, the 800 number subscriber -- rather than the IXC. The IXC, in turn, is required to bill the end-user -- again, in this case, the 800 service subscriber -- for the charge and remit the fee to the IPP provider.

CONCLUSION

The Commission should promptly initiate a rulemaking proceeding to amend Section 64.1301 of its rules to (a) prescribe per-call compensation for subscriber 800 calls, and (b) require non-OSPs to pay compensation for all types of dial-around calls.

Sincerely,


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